

October 22, 2007

Mr. Richard L. Abbott, Esquire
724 Yorklyn Road, Suite 240
Hockessin, DE 19707

**Re: Freedom of Information Act Complaint
Against City of Wilmington**

Dear Mr. Abbott:

On August 16, 2007, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), alleging that the City of Wilmington ("the City") violated FOIA by not providing you with records you requested pertaining to the South Walnut Street Urban Renewal Plan.

By letter dated July 12, 2007, you asked the City to inspect and copy eighteen categories of documents. By letter dated August 1, 2007, the City responded that it would make available for your inspection and copying the documents in categories 1-7, 9-12, and 16. The City advised that no documents "appear to exist within the City's files" for categories 8, 13, 14, and 15. As for category 18 ("Memorandum of Understanding between the City of Wilmington and the Riverfront Development Corporation referred to in proposed City of Wilmington Ordinance #2817"), the City advised that "[t]his document is still being drafted" but "will provide you with a copy of it once it is ready for public review."

As for category 17 ("All correspondence, memoranda, e-mails, letters, or other written

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communications from, to, or between City of Wilmington employees regarding the South Walnut Urban Renewal Plan Amendment for amendments after July 10, 2003"), the City took the position that "[t]hese records are not public records under 29 Del. C. §10002(g)(9), which excludes 'any records pertaining to pending or potential litigation which are not records of any court.'"

By letter dated August 20, 2007, our Office asked the City to respond to your complaint in writing by August 31, 2007. We received the City's response by facsimile on August 31, 2007. By letter dated September 5, 2007, you commented on the City's response. On September 5, 2007, our Office asked the City for additional information which we received on September 10, 2007.

According to the City, category 17 of your FOIA request is exempt from disclosure under FOIA because those records pertain to potential litigation.

In the current situation, Mr. Abbott is an attorney representing six property owners whose parcels are listed on the acquisition list of the South Walnut Street Urban Renewal Plan. The acquisition list is comprised of a list of properties that the City of Wilmington may want to acquire, possibly by condemnation, if the property owners do not cause their properties to come into compliance with the requirements of the South Walnut Street Urban Renewal Plan. Mr. Abbott's request for the correspondence is clearly an attempt to use FOIA to obtain information for use in a lawsuit against the City of Wilmington challenging the legality of the South Walnut Urban Renewal Plan. His request . . . is akin to a discovery request and certainly appears to be a request by a litigator seeking materials in preparation for litigation.

As objective criteria of potential litigation, the City cites statements you made at a public hearing on August 23, 2007 that the urban renewal plan was illegal. The City also cites two newspaper article, one dated August 23, 2007 in which you were quoted as saying it was a "virtual

certainty" that the urban renewal plan would end up in court, the other dated August 24, 2007 quoting your clients that "they would move directly to litigation if the urban renewal plan passed."

In your letter dated September 5, 2007, you contend that just because an attorney makes a FOIA request on behalf of a client is not "*ipso facto*" a ground for the City to invoke FOIA's potential litigation exemption. You also contend that the City cannot rely on statements attributed to you and your clients in August 2007 to justify a potential litigation exemption because you made your FOIA request on July 12, 2007, six weeks before. "Since the issue is whether there was 'potential litigation' at the time that the exception to the FOIA Open Records provisions was asserted, however, such *post facto* occurrences may not be relied upon to establish that there was 'potential litigation.'"

In your letter dated September 5, 2007, you do not take issue with the City's position that it should not have to disclose the record described in category 18 because "[t]his document is still being drafted. [The City] will provide you with a copy of it once it is ready for public review." Our Office notes that "[w]e believe that the courts in Delaware would not define a 'public record' under FOIA to include a working draft which the author is still revising prior to presentation to a public body." *Att'y Gen. Op.* 05-IB13 (May 9, 2005).

In your letter dated September 5, 2007, you also do not take issue with the City's contention that it does not have any records in its files responsive to your categories 8, 13, 14, and 15. The Assistant City Solicitor has represented that the City does not have any records responsive to those FOIA requests. "It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Att'y Gen. Op.* 05-IB19 (Aug. 1, 2005) (quoting *Att'y Gen. Op.* 97-IB01 (Jan. 14, 1997)).

The City provided us with a copy of the minutes of the Council's August 23, 2007 meeting. The minutes reflect that the Council discussed an Ordinance Adopting an Amended and Restated South Walnut Street Urban Renewal Plan. The minutes reflect that during a period of public comment, you spoke on behalf of your clients (six property owners in the affected area) and talked "about some of the legal issues, some of the legal problems that are presented by the plan." You questioned whether the plan created an "unlawful overlay zoning." You also questioned whether the area was truly "blighted." You stated your belief that the plan is "almost certainly unconstitutional"; is "inconsistent with your comprehensive plan"; and "an impermissible taking of land without a current need."

RELEVANT STATUTES

FOIA requires that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA does not require disclosure of "[a]ny records pertaining to pending or potential litigation which are not records of any court." *Id.* §10002(g)(9).

LEGAL AUTHORITY

In *American Civil Liberties Union of Delaware v. Danberg*, Civ.A. No. 06C-08-067, 2007 WL 901592 (Del. Super., Mar. 15, 2007) (Slights, J.), the ACLU made a FOIA request to the Department of Correction for information regarding the delivery of health care services within Delaware's prison facilities. The DOC invoked FOIA's potential litigation exemption based on

"correspondence from the ACLU, some addressed to inmates in the custody of the DOC, that suggest that the ACLU may be contemplating litigation against the DOC based on alleged inadequate medical care at DOC facilities." 2007 WL 901592, at p.5. One letter stated: "'We will seriously consider bringing a class action lawsuit on behalf of Delaware prisoners, seeking improvements in the medical and mental care system in the State's prisons and jails.'" *Id.*

In analyzing the potential litigation exemption under FOIA the Superior Court observed:

As the Attorney General has recognized, '[i]n our litigious society, a governmental agency always faces some threat of suit. To construe the term 'potential litigation' to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].' To address this dynamic, the Attorney General has adopted a two pronged test to determine if the 'potential litigation' exception would justify a refusal to supply information in response to a FOIA request: (1) litigation must be likely or reasonably foreseeable; and (2) there must be a 'clear nexus' between the requested documents and the subject matter of the litigation. This test strikes a balance between the need to construe the exceptions to FOIA narrowly and the need to give effect to the actual words of the statute which provide for the exception. Accordingly, the test will be adopted here.

Danberg, 2007 WL 901592, at p.4 (quoting *Att'y Gen. Op.* 02-IB12 (May 21, 2002) and *Att'y Gen. Op.* 02-IB30 (Dec. 2, 2002)).

"When determining whether litigation is 'likely or reasonably foreseeable,' the public body should look for objective signs that litigation is coming. For instance, a written demand letter in which a claim is asserted, or action is demanded, may give rise to a proper inference that litigation will soon follow." *Danberg*, 2007 WL 901592, at p.4 (quoting *Att'y Gen. Op.* 02-IB30). "Other indicators of 'potential litigation' might include 'previous or preexisting litigation between the

parties or proof of ongoing litigation concerning similar claims or proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.'" *Id.* "In any event, whatever the indicator, the public body must be able to point to a 'realistic and tangible threat of litigation . . . characterized with reference to objective factors' before it may avail itself of the 'potential litigation' exception to FOIA." *Danberg*, 2007 WL 901592, at p.4 (quoting *Att'y Gen. Op.* 02-IB12).

In *Danberg*, the Superior Court was "satisfied that the ACLU's letters to inmates give rise to reasonable, objective and articulable grounds to believe that the ACLU may be preparing for litigation, and that the litigation may implicate the same issues that are the subject of the ACLU's FOIA request to the DOC. . . .[T]hese letters suggest that there may be more in the works than 'unrealized or idle threats of litigation.'" 2007 WL 901592, at p.5 (quoting *Att'y Gen. Op.* 02-IB12).

When the City responded to your FOIA request by letter dated August 1, 2007, our Office does not believe that there were any objective criteria to invoke FOIA's potential litigation exception. In reviewing a public body's decision to withhold records, our Office "must of necessity limit the scope of [our] inquiry to an appropriate time frame" and our "review properly focuses on the time the determination to withhold is made." *Bonner v. United States Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991).

The only indicia of potential litigation at the time the City responded to your FOIA request on August 1, 2007 was that the FOIA request was made by you, an attorney, on behalf of your clients as opposed to the clients themselves. Our Office does not believe that was the kind of objective

criteria required for the City to avail itself of FOIA's potential litigation exemption.¹ Attorneys perform a variety of services for their clients short of filing lawsuits. As you point out, your "July 12, 2007 FOIA request was submitted in order to obtain documents critical to presentations on behalf of my clients at both the Wilmington City Planning Commission meeting and the Wilmington City Council public hearing with respect to the South Walnut Urban Renewal Plan ('SWURP'). Obviously, the City Council could have rejected the SWURP, thereby mooted even the theoretical possibility of litigation. Indeed, it was not until the SWURP was approved on August 23rd that litigation could have realistically been contemplated."

CONCLUSION

For the foregoing reasons, our Office determines that the City violated the public record requirements of FOIA by not providing you with the documents you requested in category 17 of your July 12, 2007 FOIA request. We do not believe that at the time of the City's response to your FOIA request (August 1, 2007) that there were any sufficiently objective indicators that litigation between your clients and the City was reasonably foreseeable.

¹ In *Mell v. New Castle County*, 835 A.2d 141 (Del. Super. 2003) (Slights, J.), the Superior Court held that an attorney did not have standing under FOIA to request public records if the attorney made the request on behalf of a client as opposed to "in his individual capacity as a 'citizen of the state.'" 835 A.2d at 147 (quoting 29 *Del. C.* §10003(a)). That holding is questionable in light of the decision in *Lee v. Minner*, 369 F.Supp.2d 527 (D. Del. 2005) (Farnan, J.), *aff'd*, 458 F.3d 194 (3rd Cir. 2006). In any event, the City has not challenged your standing to make your July 12, 2007 FOIA request.

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The City can remediate this violation by making documents responsive to category 17 of your FOIA request available to you for inspection and copying within twenty days of the date of this letter. Our Office does not express any opinion whether certain information contained in those documents might be exempt from disclosure under FOIA based on an exemption other than the potential litigation exemption.

Our Office asks the Assistant City Solicitor to report back to us in writing within ten days after remediation is completed.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
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cc: The Honorable Joseph R. Biden, III
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